In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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HENRY W. KERR, et al., Petitioners,

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NORTHERN DISTRICT OF CALIFORNIA, Respondent,

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Real Parties in Interest.

Brief in Opposition to Petition
For Writs of Certiorari

STATEMENT

These petitions for a writ of certiorari raise a narrow issue in a case where the court below expressly declined to reach the major claims advanced by petitioners in that court and in the District Court.

Thus the decision of the court below -- which in any event is clearly correct -- is a particularly inappropriate one for this Court to review by way of certiorari.

The underlying case is a civil rights action brought under 42 U.S.C. §1983, by seven California state prisoners, on behalf of themselves and all others similarly situated. On August 1, 1974, the District Court entered an order that the action was to be maintained as a class action under Rule 23(b)(2), F.R.Civ.P., on behalf of "all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the Department or on parole."

Plaintiffs and their class contend that various components of the present

parole-granting system -- which permits defendant members of the Adult Authority (the California parole board) to exercise virtually unlimited discretion over the length of terms of prisoners sentenced under California's indeterminate sentence law -- violates the Sixth and Fourteenth Amendments of the United States Constitution. Specifically, plaintiffs have alleged -- and must therefore prove at trial -- that the board members have no expertise in term-fixing and parole revocation; that the written materials upon which they primarily rely are, to a significant degree, false and/or unreliable; that the hearings themselves are fatally defective because the board members have insufficient time and because the prisoner is unable, without counsel, to adequately represent himself; that the board members

operate in the absence of adequate procedural safeguards or substantive criteria; and that the decisions reached by the board are consistently arbitrary and discriminatory. As a result of these defects, respondents seek declaratory and injunctive relief requiring that certan specific procedural safeguards attend those hearings at which terms may be fixed and parole may be granted, rescinded, or revoked.

After preliminary motions by defendants to dismiss the case had been denied by the District Court and by the court below, respondents served upon petitioners a request for the production of documents under Rule 34, Federal Rules of Civil Procedure, including those documents which are the subject of the instant petition for a writ of certiorari, and which are described in the opinion of the court below

(see Ex. A to Pet. at v, n.5). Initially, petitioners simply refused to answer or object to the Rule 34 request until they were expressly ordered to do so by the District Court. Thereafter, petitioners filed a response which, inter alia, objected to producing the documents here at issue on the grounds that they were privileged. However, no officer of the agencies involved asserted, "in person or in writing, any privilege in the District Court" (id. at xii), nor did any such official set forth the rationale of the claimed privilege or even identify any specific documents as coming within the privilege. Instead, "petitioners' counsel merely raised a blanket objection covering any and all documents" which might be responsive to those requested by respondents (Ex. A to Pet. at xiii).

Subsequently, petitioners filed a separate Rule 34 request for production of the central files of every twentieth inmate in the California prison system, since those files are the only documents upon which the parole board bases its decisions. Therefore, in order to document their claims that the parole granting process involves the resolution of complex factual issues, which requires the due process safeguards contended for by respondents; that the inmates appearing before the board are often incapable of representing themselves (because, e.g., they are on heavy medication, have low IQs, or language difficulties, etc.); that the parole board members are incapable, due to time constraints and their own training and experience, of analyzing the complex medical and psychiatric

material contained in these files; that legally impermissible criteria are used in denying parole; and that the files themselves contain a considerable amount of false and misleading material, it is necessary for plaintiffs to have access to at least a representative selection, especially since counsel for petitioners has access to each and every one of these files. As with the documents described above, petitioners strongly resisted the requested discovery, necessitating extensive proceedings in the District Court pursuant to Rule 37, Federal Rules of Civil Procedure.

These proceedings -- with respect to both Rule 34 requests -- took the form of full hearings before a United States Magistrate and thereafter the District Court, and eventuated in two orders by the Dis-

trict Court that petitioners produce the documents requested (see Ex. B and D to Pet.). However the orders requiring production also contained various protective provisions which (1) limited the inspection of certain documents to the attorneys (and two investigators and law students) representing respondents (Ex. B at xvi; Ex. D at xxvi); (2) charged respondents' attorneys with protecting the confidentiality of all files inspected by them (Ex. D at xxviii); (3) limited the uses which could be made of the files to those connected with the litigation (Ex. B at xvi; Ex. D at xxviii); and (4) required counsel for respondents to obtain advance written permission from any inmate whose file they wished to inspect (Ex. D at xxvii). Petitioners nonetheless sought review of each order by way of two peti-

tions for mandamus filed in the court below. One petition was summarily denied on December 18, 1974 (see Ex. C to Pet.), and the other petition received a full hearing before it was denied by the court below pursuant to an opinion entered on January 17, 1975 (Ex. A to Pet.).

In the courts below, petitioners asserted that the documents in question fell within certain state and federal privileges or that, in the alternative, the District Court should at least have conducted an in camera inspection of the documents before ordering their disclosure. However, the court below declined "to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of in camera inspection is necessary before allowing disclosure" (Ex. A at xi). In-

stead, it held that the privilege itself had not been properly lodged by the head of the department which had control over the documents, after personal consideration by him. Such a claim, the court held, requires the officer to designate which documents are privileged and to "state with specificity the rationale of the claimed privilege" (id. at xii). Since no such claim had ever been lodged in the District Court -- petitioners having filed only "a blanket objection covering any and all documents" (ibid.) -- the court denied the petition. It noted, however, that "[s]ince there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek in camera inspection, at the time the documents are

discovered in the District Court" (id. at xiii).

Petitioners, however; did not choose to follow the suggestion of the court below that they submit adequate claims of privilege in the District Court. Instead, they have asked this court to review (by way of certiorari) the opinion of the court below, and to review (by mandamus) the underlying discovery orders of the District Court.

Question Presented

Is it an abuse of discretion for a District Court to require a government agency, which objects to producing documents requested under Rule 34 of the Federal Rules of Civil Procedure on the ground that they come within a governmental privilege, to lodge a formal claim of privilege which (1) specifies the documents

for which the privilege is claimed, and (2) states with specificity the rationale of the claimed privilege?

ARGUMENT

In the court below, petitioners' two principal arguments were (1) that the documents here in question were privileged under federal and state law, and (2) that the District Court was required to conduct an in camera hearing before ordering disclosure. That court, however, expressly declined to reach either question (Ex. A at xi), although it did reject two statutory claims of privilege which petitioners do not pursue in the instant petition. Instead, it issued a narrow decision that in order to invoke a qualified governmental privilege or obtain an in camera hearing the privilege "must be formally asserted and delineated in order to be

raised properly" (id. at xi).

Deprived in this fashion of a ruling on their principal objections to the underlying discovery orders, petitioners have strained mightily in their instant petition for a writ of certiorari to articulate new issues of importance which would justify plenary consideration by this Court. In doing so, they appear to be arguing that where, as here, an attorney representing the head of a governmental agency asserts a blanket objection to producing documents under Rule 34, on the ground that they are covered by a qualified governmental privilege, the failure of a District Court to conduct an in camera inspection necessarily violates the Fourth Amendment and Rule 26, Federal Rules of Civil Procedure (see Pet. at 6-7). Yet as we shall show, the decision of the

court below is clearly correct and, in any event, yields no issue which is worthy of this Court's consideration by way of certiorari.

I

THE COURT BELOW WAS CLEARLY CORRECT IN REQUIRING A CLAIM OF GOVERNMENTAL PRIVILEGE TO BE FORMALLY ASSERTED AND PROPERLY DELINEATED

The heart of the ruling of the court below -- which follows well-established law in requiring a governmental agency to follow certain minimum procedures when invoking a privilege -- consists of two separate points. First, that the privilege must be claimed by an officer of the agency who must, after personal consideration, explain to the court the reasons for the claimed privilege. And second, that in objecting to the production of documents

on the ground of privilege, a party must specify which portions of the documents are allegedly privileged and for what reasons.

A. A Formal Claim of Privilege Must Be Lodged By the Head of the Department.

Following United States v. Reynolds, 345 U.S. 1,8n.20(1953), the court below held that the claim of privilege by a governmental agency must be formally asserted by the head of the department who must "'have seen and considered the contents of the documents and himself have formed the view that on the grounds of public interest they ought not to be produced'" (Ex. A to Pet. at xii) (emphsis supplied). The court below further held that the agency's submission must "state with specificity the nature of the claimed privilege" (ibid.). Such a

requirement is not only correct as a matter of law, but is eminently sensible on policy grounds as well.

First, this Court has said that even where military secrets are concerned, the governmental privilege "is not to be lightly invoked." United States v. Reynolds, supra, 345 U.S. at 7-8. By requiring that the privilege be asserted by a department head rather than by counsel, a meaningful brake is put upon the indiscriminate use of the privilege.

Second, the privilege is to be asserted with respect to documents only if their production would injure the public interest. Since it is plain that in many situations (e.g., the Nixon tapes) the disclosure of documents which would in no way injure the public interest would indeed injure the position of a

party litigant, it makes considerable sense to require that the claim be not only lodged but also elaborated upon by a department head rather than by counsel.

Third, it is essential for the court to obtain "with specificity" the reasons which, in the considered opinion of the agency itself, would make disclosure harmful to the public interest. In this regard, petitioners entirely miss the mark when they argue (Pet. at 25-26) that the policies "on which the department would rely are different from the policies on which the court would rely to evaluate the claim of privilege" (id. at 26). Of course they are different: but to perform its role -- in striking the balance between the competing needs for confidentiality and disclosure -- the District Court clearly needs to know, not that

documents are considered to be "confidential", but rather why they are considered to be confidential, and what specific harm is foreseen by the department head if they are disclosed. For only if a court has such information is it in a position to closely scrutinize the validity of the claimed privilege, and also determine what sort of protective order, if any, would sufficiently obviate that harm so as to justify disclosure.

This very case furnishes a good example of the need for such requirements. In the District Court, the governmental privilege was never asserted by an officer of the Adult Authority or the Department of Corrections -- after personal consideration, for reasons related to the public interest -- but rather by the Attorney General, whose position in the underlying

litigation has been greatly enhanced by withholding the documents in question from the plaintiffs. (The documents were first requested by respondents in June of 1973, and their production has been ordered by the United States Magistrate, the District Court, and the court below; yet at this writing, in March of 1975, with a trial date of June 9, 1975, the documents are still being successfully withheld by petitioners.)

Of greater significance, however, is the fact that the District Court was not furnished any explanation whatsoever as to <u>why</u> the public interest would be harmed by the disclosure, especially where, as here, a strong protective order was entered. Nor, as we shall presently discuss, was the court even told what specific documents are involved, and what

portions of them are deemed to be privileged. Rather, the court had before it only the sweeping and conclusory statement by the counsel of the party resisting discovery that all of the documents at issue were privileged or confidential. In such a case, the wisdom -- indeed, the necessity -- of the rule requiring personal consideration by a department head, followed by a specific description of the harm to the public interest in the event of disclosure in litigation, becomes manifest.

B. The Documents For Which Privilege is Claimed Must Be Designated by the Party Resisting Discovery.

As earlier noted, petitioners made no attempt to identify the documents called for by respondents' Rule 34 request; to designate those portions of the documents for which the privilege was claimed;

or to inform the District Court of the particular reasons for claiming the privilege. Instead, they baldly asserted a blanket privilege, covering whatever documents might be involved, and insisted that the District Court either uphold the privilege or conduct an in camera inspection of all of the (unspecified) documents.

However, in camera inspection under such conditions would be highly inappropriate, for the several reasons discussed in the comprehensive opinion in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).[1/]

1/ Although Vaughn v. Rosen, supra, is a case involving disclosure of documents under the Federal Freedom of Information Act, the considerations discussed by the court in its careful and comprehensive decision are precisely those at issue whenever a party resisting discovery under Rule 34 invokes a governmental privilege and seeks in camera inspection.

In Vaughn the court pointed out that the tactic of joining a blanket assertion of governmental privilege with a demand for in camera inspection (1) deprives the discovering party of an opportunity to contest the government's characterization of the documents as confidential and (2) places an enormous burden on the lower courts. For these reasons the court in Vaughn set out guidelines which require an agency resisting disclosure to (1) designate the documents which are to be withheld; (2) specify in detail which portions of the document are disclosable and which are allegedly exempt; and (3) submit a relatively detailed analysis of why the document is exempt from disclosure. Such a procedure, the court held, would permit more adequate adversary testing and would alleviate the burden placed upon the

District Court. Certainly this approach is consistent with the overwhelming authority, never contested by petitioners at any stage in the District Court or in the court below, which places upon a party opposing discovery the burden of showing that the documents are in fact privileged. 2/

Thus at a time when courts are properly requiring more specificity from governmental agencies seeking to withhold documents on the basis of "confidentiality", petitioners are asking this Court for a ruling that a party resisting discovery under Rule 34 need only file a blanket

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2/ See, e.g., Rogers v. Tri-State Materials Corporation, 51 F.R.D. 234, 247 (N.D. West Va. 1970); Apco Oil Corp. v. Certified Transport., Inc., 46 F.R.D. 428, 432 (E.D. Mo. 1969); Pleasant Hill Bank v. United States, 58 F.R.D. 97, 101 (W.D. Mo. 1973); Advisory Committee's Note to 1970 Amendment to Rule 33(a), 48 F.R.D. at 523; 8 Wright & Miller, Federal Practice and Procedure, at 265, 542-43.

claim of "privilege" in order to either (1) escape discovery altogether or (2) require a District Court, unaided by the illumination which the contending parties could provide, to conduct its own in camera inspection, regardless of how burdensome such a task might be. For under the circumstances of this case -- where petitioners never identified, in the District Court, either the documents involved or the rationale behind their claim of privilege -- that is exactly the rule which this Court would have to adopt in order to reverse the narrow ruling of the court below.

II

NEITHER THE RULING OF THE COURT BELOW, NOR THE UNDERLYING DISCOVERY ORDER OF THE DISTRICT COURT, VIOLATES THE FOURTH AMENDMENT

Petitioners' Fourth Amendment arguments -- unsupported by citation to any authority -- are wholly without merit. The constitutionality of Rule 34, Federal Rules of Civil Procedure -- requiring the production of documents which are relevant to the subject matter of a pending action and are not privileged -- has never been thought to run afoul of the Fourth Amendment. See 8 Wright & Miller, supra, §2202 at 587-89, and authorities cited therein. As petitioners necessarily concede, the Fourth Amendment requires only that the disclosure sought shall not be

unreasonable, United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and neither the ruling of the court below nor the underlying discovery orders of the District Court can be considered unreasonable under the circumstances of this case.

In the first place, petitioners continually attempt to characterize the documents in question as confidential hence privileged, and to characterize the District Court's refusal to conduct an in camera inspection as a refusal to make an informed resolution of the competing considerations of disclosure and confidentiality. Yet the ruling of the court below merely holds that if the governmental agency whose documents they are wishes to invoke a privilge or to obtain in camera

inspection, the privilege must be "formally asserted and delineated in order to be raised properly" (Ex. A to Pet. at xi). Surely it cannot be considered "unreasonable", under the circumstances of this case, to require that an officer of the appropriate agency personally consider and pass upon the privilege to be invoked, or that he thereafter "state with specificity the rationale of the claimed privilege" (id. at xi). Cf. United States v. Morton Salt Co., supra, 338 U.S. at 653. Nor, when petitioners failed to file such a statement, but instead submitted a sweeping assertion by their attorney that all of the documents asked for were "privileged", was it unreasonable for the District Court to issue an order requiring production, subject to the provisions of a strict protective order. Indeed,

upon remand petitioners may still "assert a privilege to a particular document or class of documents, and perhaps seek in camera inspection, at the time the documents are discovered in the District Court" (id. at xiii).

Furthermore, there are many situations in which it is not unreasonable for a District Court -- before which a privilege has been asserted in response to a Rule 34 request for production -- to weigh the competing interests of confidentiality and disclosure, and, without an in camera inspection, strike the balance in favor of disclosure. In fact, such decisions are made every day in the District Courts, and petitioners are necessarily unable to cite any case which holds that in camera inspection is required whenever a privilege is rejected. In this case, as we

have seen, (1) petitioners made no showing that the documents were confidential, or that petitioners would be injured by disclosure; (2) the documents are not only clearly relevant (as found by the Magistrate, the District Court, and the court below) but are crucial, since they lie at the very heart of the case in the District Court; (3) whatever harm might conceivably arise from their disclosure in litigation was all but eliminated by the entry of a strong protective order; and (4) the documents are those of a public agency, cf. United States v. Morton Salt Co., supra, 338 U.S. at 652, whose main function is deciding whether or not to maintain thousands of persons in prison pursuant to procedures attacked in the underlying litigation as unconstitutional. Under these circumstances, it can hardly be considered

"unreasonable" for the District Court to have struck the balance between confidentiality and disclosure in favor of the latter. Nor can it possibly be said that such a finding of reasonableness is an abuse of discretion or a "usurpation of power" such as to justify review by way of mandamus. See Will v. United States, 389 U.S. 90, 95-96 (1967); Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the instant petition for writs of certiorari should be denied.

March 6, 1975

Respectfully submitted,

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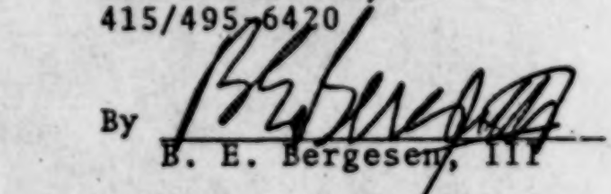
By 
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